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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 108

CENTAUR CONSTRUCTION COMPANY, INC.,
A CORPORATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

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✓ HARRY S. HALL,
JOHN F. HAYES,
Of Counsel.



INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Executive order involved	2
Questions presented	2
Statement of matter involved	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Conclusion	7
Appendix A	8
Appendix B	8
Appendix C	10

CITATIONS

Cases:

<i>Bartlett v. Kane</i> , 16 How. 263	6
<i>Belcher v. Linn</i> , 24 How. 508	6
<i>Martin v. Mott</i> , 12 Wheat. 19	6
<i>United States v. Arredondo</i> , 6 Pet. 691	6
<i>United States v. Bush & Co.</i> , 310 U. S. 371	6
<i>United States v. Chemical Foundation, Inc.</i> , 272 U. S. 1	6
<i>United States v. Howard P. Foley Co.</i> , 91 Law Ed. Advance Op. 135	7

Statutes:

First War Powers Act, Sec. 201, 55 Stat. 839	2
Sec. 288 (b), Title 28 U. S. Code	2, 7
Sec. 611, Title 50 App. U. S. C. A. pp. 244-248	5



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*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States, entered on January 6, 1947.

Opinion Below

The opinion of the Court of Claims is not reported but will be found in the record (R. 17).

Jurisdiction

The judgment of the Court of Claims was entered on January 6, 1947 (R. 32). A motion for a new trial was

overruled on March 3, 1947 (R. 32). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

Statute Involved

Section 201 of the First War Powers Act, 55 Stat. 839. (See Appendix A, p. 8.)

Executive Order Involved

Executive Order No. 9001. (See Appendix B, p. 8.)

Questions Presented

Pursuant to Section 201 of the First War Powers Act, the President of the United States issued Executive Order No. 9001, authorizing the Navy Department to amend contracts whenever it was deemed that the prosecution of the war would thereby be facilitated. Pursuant to said Act and the Executive Order of the President, the Navy Department amended the contract of petitioner, by the allowance of certain claims reserved from the general release, to facilitate the prosecution of the war. The questions presented are: (1) Whether the Court of Claims had the power to review the Executive Order of the President in delegating authority to the Navy Department to amend contracts; and (2) Whether the Court of Claims had the power to review the facts and reasoning of the Navy Department in reaching the decision that such an amendment would facilitate the prosecution of the war.

Statement of Matter Involved

Suit was brought to recover certain allowances made by the Navy Department to petitioner, pursuant to the First War Powers Act.

Petitioner had entered into a contract prior to the war for construction work at the New York Navy Yard with the Chief of the Bureau of Yards and Docks. The work included the construction of a sewer and pile work.

The driving of test piles disclosed materially different conditions from those indicated by the drawings and specifications, making it necessary for the Navy Department to revise the plans for the sewer and pile work. There was a delay of some four weeks in the approval by the Navy Department of the revised plans, causing additional expense to petitioner. Notwithstanding the delay, at first, the Navy Department withheld liquidated damages of \$5,080.00, and did not pay petitioner's additional expenses incurred during the delay in approval of the revised plans.

After the work was completed, and on June 9, 1941, the Navy Department paid petitioner the amount admittedly due at that time, and, pursuant to Article 16 (d) of the contract, accepted a release from all claims except the sum of \$5,080.00 withheld as liquidated damages, and claims for additional expenses for labor, equipment, insurance, overhead during the suspension period while waiting for approval of the revised plans.

Thereafter, war was declared, and the First War Powers Act was approved, committing authority to the President of the United States to authorize any department of the Government to amend contracts theretofore or thereafter made, without regard to the provisions of law relating to the making, performance, amendment, or modification thereof, whenever he deemed such action would facilitate the prosecution of the war.

Promptly after the approval of the Act, the President issued Executive Order No. 9001, by which he authorized the Navy Department and others to amend contracts or to settle claims under contracts theretofore or thereafter made, including liquidated damages, irrespective of the

time or the circumstances of the amending or modifying contract, and irrespective of the rights which may have accrued.

In October, 1942, petitioner was engaged in work under other war contracts, one being for the United States Coast Guard, then under the Navy Department, for construction of Shipways at Curtis Bay, Maryland, and involving over a million dollars in costs.

Pursuant to the powers granted to him by said Act and by the Executive Order of the President, Admiral L. B. Combs, assistant to the Chief of the Bureau of Yards and Docks, on October 22, 1942, amended petitioner's contract, by the allowance of the liquidated damages withheld, and the allowance of a portion of the additional expenses. In his letter, Admiral Combs said:

In the judgment of the Navy Department the release to you of the accrued liquidated damages in the sum of \$5.080. and the allowance to you of \$4,581.59 covering adjustment for the additional costs mentioned, will facilitate the prosecution of the war in that it will enable you the better to carry on war work on which you are now engaged.

The Court of Claims held: (1) That the Executive Order of the President did not authorize the Navy Department to amend this contract; (2) that the Navy Department was only authorized to amend pending and future contracts; and (3) that such amendment did not facilitate the prosecution of the war, although the Act committed authority to the President, and to such departments as he delegated the power, the right to decide what amendments would facilitate the prosecution of the war.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the President did not authorize the Navy Department to amend this contract.
2. In holding that it had the power to review the facts and reasoning of the Navy Department upon which its decision was reached.
3. In holding that the amendment did not facilitate the prosecution of the war.
4. In dismissing the petition.

Reasons For Granting the Writ

1. The court below has decided an important question relating to the First War Powers Act which has not heretofore been determined by this Court.

The President extended the power to amend contracts under the Act by numerous executive orders to other departments and contracting agencies.¹ Petitioner believes that such agencies amended many contracts under the authority of the Act and the orders of the President, some of which may be litigated, and that this Court should settle the question for the guidance of the lower courts and departments and agencies concerned.

2. The Act having committed power to the President, and by him to the Navy Department, to decide what amendments would facilitate the prosecution of the war, it is believed that the court below had no power to review the facts and reasoning upon which the Navy Department reached its decision, nor that the court below could substitute its judg-

¹ Executive Orders extending the power to amend contracts under the First War Powers Act may be found in Title 50, App., Sec. 611 U. S. C. A., pp. 244-248.

ment for that of those to whom Congress committed the right to make the decision as to what amendment would facilitate the prosecution of the war. The decision of the court below is believed to be in conflict with applicable decisions of this Court in similar cases. *United States v. Bush & Co.*, 310 U. S. 371; and *United States v. Chemical Foundation, Inc.*, 272 U. S. 1. See also *Martin v. Mott*, 12 Wheat. 19.

It is believed that the decision of the court below conflicts with the long established rule that where Congress has authorized a public officer to take some specified action which in his judgment is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *United States v. Bush & Co.*, *supra*.

Public officers are presumed to have properly discharged their official duties and to have acted upon knowledge of the material facts. The basis of fact on which they acted and the validity of the reason stated by them should not have been reviewed. *United States v. Chemical Foundation, Inc.*, *supra*.

Congress constituted the President the sole judge of what departments and agencies should exercise the power under the Act, and made such departments and agencies as to which the President extended the power, the sole and exclusive judge of what amendments would facilitate the prosecution of the war. No provision for review of their decisions was made. No appeal was provided for from their decisions. It is, therefore, believed that the decision was final. *Bartlett v. Kane*, 16 How. 263; *Belcher v. Linn*, 24 How. 508; and *United States v. Arredondo*, 6 Pet. 691.

3. The decision of the court below that the President did not authorize the Navy Department to amend the contract on which the work had been completed, and to allow

the claims reserved under the terms of the contract, is believed to be in conflict with the First War Powers Act and with the Executive Order of the President. It is believed that the President delegated all the power which Congress committed to him under the Act to the Navy Department, and that it had full authority to amend the contract, if in its judgment, the prosecution of the war would thereby be facilitated. *United States v. Chemical Foundation, Inc., supra*; and *United States v. Bush & Co., supra*.

This Court has authority to review errors assigned, to the effect that an ultimate finding of fact is not supported by the findings of the evidentiary or primary fact. Sec. 288 (b), Title 28 U. S. Code.

Under the rules of this Court, this Court will review the decision of the lower court, where such court has decided a Federal question in a way probably in conflict with applicable decisions of this Court. *United States v. Howard P. Foley Co.*, 91 Law Ed. Advance Op. 135.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPHUS C. TRIMBLE,
Counsel for Petitioner.

Of Counsel:

HARRY S. HALL,
JOHN F. HAYES.

APPENDIX A

FIRST WAR POWERS ACT. TITLE II, SECTION 201

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided*, That nothing herein shall be construed to authorize the use of the cost plus a percentage of cost system of contracting: *provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

55 Stat. 839.

APPENDIX B

EXECUTIVE ORDER No. 9001. TITLE I

1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War Effort," approved December 18, 1941 (hereinafter called "the Act"), and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts ap-

appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and Navy Departments, and the United States Maritime Commission.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of the war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts, and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in

the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

4. Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required.

APPENDIX C

EXCERPTS FROM THE DEBATES IN CONGRESS RELATIVE TO THE FIRST WAR POWERS ACT

The Legislative History of Section 201, Title II, First War Powers Act, found in Vol. 87, Part 9, Congressional Record, 77th Congress, 1st Session, at the pages hereinafter indicated, shows:

Congressman Hancock: * * * "Perhaps the most far reaching provisions of the bill are contained in title II, which permits the President or any of his agents to enter into contracts without regard to the provisions of any other laws * * * " (p. 9860)

Again he said: * * * "We hesitate to vote for anything as dangerous and far-reaching as this Title, but I think the reasons for it justify it, is speed in negotiating contracts and distribution of contracts to those who are qualified to produce what we need." (p. 9861).

Congressman Quinne: * * * "*We now take the lid off entirely* with the exception that we still outlaw that sort of contract known as cost plus." (p. 9862).

Senator Van Nuys: * * * "In a memorandum prepared by the Department of Justice there is set forth

four objects which it is sought to reach by this provision (Title II). The first is to enter into contracts without competitive bidding * * * Second, to enter into contracts without performance bonds. *Third, to amend contracts.* Fourth, to make progress payments on contracts." (pp. 9838-9).

Senator Taft: "It seems to me that the language is clear and there can be in my opinion not the slightest doubt that *this does change the contract laws* as well as merely the procedure of making contracts." (p. 9839).

Senator Danaher: "It was my understanding as I sat in the Committee and listened to the explanation, that whatever powers are contemplated under Title II are necessary * * * It is my understanding that *the bill would enlarge vastly the powers of the President* in the particulars mentioned. I favor Title II just as I favor the bill, because our whole effort was designed within the meaning of the language * * * *to provide for modifications of contracts whenever the President deems such action will facilitate the prosecution of the war.*" (p. 9839).

Senator Taft: "I only used that however, as an example that this is a broad and far-reaching power. I think broader than we realize." (p. 9839).

Senator Vandenburg: "Mr. President: May I ask for an interpretation of the meaning of the words * * * or modification of contracts. Does that language mean that the President might change the price in a contract in any way he saw fit, for any body, at any time, or place, of course assuming that it would be in what he believed to be the national interest, would this language grant him the right to make any contract at any price he pleased with any body?"

Senator Van Nuys replied: "It would enable him to modify by consent. Under the present law a contract cannot be modified even with the consent of both parties." (p. 9839). (Italics ours.)